

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

FRANCISCO TERRAZAS

Claimant

V.

KENAI DRILLING LIMITED

Respondent

AND

**INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA**

Insurance Carrier

Docket No. 1,059,920

ORDER

Claimant requested review of the December 29, 2014, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on May 12, 2015.

APPEARANCES

Terry J. Malone, of Dodge City, Kansas, appeared for the claimant. Kristina Schlake, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant had an 11 percent permanent partial impairment to the right lower leg at the ankle due to an accidental injury arising out of and in the course of his employment. The ALJ found claimant failed to prove the prevailing factor for his back condition and left hip condition was the February 11, 2012, accident.

Claimant appeals, arguing the ALJ failed to properly consider the testimony of Dr. Murati as it relates to the significance of the May 16, 2014, MRI report. Claimant contends the MRI provides objective evidence of his low back and hip pain, which according to Dr. Murati, resulted in an 18 percent whole person impairment. Therefore, claimant contends he is entitled to a permanent partial general (work) disability.

Respondent contends the Award should be affirmed and claimant limited to his lower leg impairment, as claimant has not met his burden of proving the accident was the prevailing factor causing his low back and left hip conditions.

The issue on appeal is: What is the nature and extent of claimant's injury and is claimant entitled to a work disability?

FINDINGS OF FACT

Claimant was hired to work for respondent out of the Liberal, Kansas office. On February 11, 2012, he was working on a drilling site in Texas. Claimant was rolling hydraulic cable from a truck and, as he was hooking it up, he slipped and fell from the trailer landing on his right ankle. He was unable to stand up and after 30 minutes the foreman took him to the emergency room.

At the emergency room, claimant saw James W. Morton, M.D. Claimant presented with pain in his right ankle. He had pain, tenderness, swelling and limited range of motion. Dr. Morton determined claimant had a soft tissue injury consistent with a sprain, strain and contusion. Dr. Morton recommended claimant stay off work for several days and keep his foot and ankle elevated until he was able to ambulate without difficulty.

Claimant did not work the day after the accident because he was in a lot of pain and could not move his foot. Claimant testified he called in and left a message for his supervisor, Robert Place, reporting he would not be in to work. Claimant's work required him to be on his feet all day and he was in too much pain to do that.

In a letter dated March 11, 2012, Dr. Morton indicated the supervisor that was with claimant was adamant that claimant return to work the next day and indicated there would be work claimant could perform and keep his foot elevated. Dr. Morton voiced his concern, but ultimately allowed claimant to return to work. However, claimant has not worked since the accident as his employment was terminated the day after the accident, February 12, 2012, based upon a no call/no show. With respondent, a no call/no show results in an automatic termination of employment.

Claimant testified he began to notice pain in his hips and back two months after the accident. He testified he thought the pain was from the use of crutches and using his left side more. Claimant had surgery on his ankle in October 2012 with Naomi Shields, M.D., a board certified orthopedic surgeon. Claimant testified he had a limp after the accident and he continued to limp after surgery. He also testified he first noticed pain in his left hip and down his left side two months after getting his cast. He testified he went from tiredness to pain on the left side of his body, in his back and hip and down his leg. Claimant later testified he also has pain in his right hip. He indicated the pain on the right side is from the middle down into the hip. He indicated the pain is constant and limits his ability to stand for long. Claimant indicated the pain starts on the right and radiates to the left. He claims to have reported this pain to Dr. Shields at his first post surgery visit.

When claimant was released to return to work after surgery, he went to work for Redi-Mix in Perryton, Texas. This was construction work pouring cement and cleaning trucks. He worked 45 to 50 hours a week at \$11 an hour from April 2013 to August 2013. He was fired because he had to stop working a lot because of pain in his back and legs. Claimant was able to get another job with an older gentlemen in Perryton, building fences. Claimant worked 20 hours a week in this job at \$12 an hour. Claimant held this job until February 2014, when the gentlemen he was working for retired. Claimant indicated his back and hips continued to hurt while he performed this fencing job.

Claimant's next job was with Texas Farms, inseminating pigs. Claimant indicted this job required he stand all day and caused his back and hips to hurt. He held this job from April 2014 until June 2014, when he moved to Dallas, Texas. He made \$11 an hour.

Claimant now works in landscaping. He works 50 to 60 hours a week and makes \$13 an hour. His back and hips continue to hurt with this job. He also continues to limp on his ankle. He indicated it is hard to move freely because of back pain.

Claimant denies any prior injury to his back and hips. He has not seen a doctor regarding his back pain. Despite surgery, the symptoms in claimant's ankle have not improved and are worse than before. Claimant testified he can stand on his ankle all day, but by the time he gets home, his ankle is swollen and purple.

Dr. Shields first began treating claimant on July 25, 2012, and ultimately performed surgery on claimant on September 24, 2012, involving a right ankle arthroscopy with debridement from micro fracturing of a lateral talar osteochondral defect and an open lateral reconstruction. Dr. Shields released claimant on February 7, 2013, with restrictions. On April 4, 2013, claimant was found to be at maximum medical improvement and released to full duty. Dr. Shields assigned a 2 percent whole person impairment which equates to a 5 percent functional impairment to the lower extremity, based on the 4th Edition of the *AMA Guides*¹ for osteochondral defect and 0 percent for a stable ankle.

Dr. Shields did not recall claimant having a limp and there is no mention of back pain in claimant's records. If claimant had voiced those complaints they would have been noted in his records.

Dr. Shields, as the treating physician, released claimant with no restrictions. Therefore, claimant should have been able to return to the job he had been performing prior to the accident and earning the same wages. Her only instruction was that claimant wear supportive boots and his ankle brace, should he need to work on uneven ground.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

Claimant met with board certified physical medicine and rehabilitation specialist Pedro Murati, M.D., for an examination on August 26, 2013, at the request of his attorney. Claimant's chief complaints were right ankle pain, left hip pain due to putting more pressure on the left side, low back pain, right foot cramping and chest pain from the use of crutches. Claimant denied any significant preexisting injuries to the right ankle, left hip and low back prior to the work-related accident on February 11, 2012.

Dr. Murati diagnosed: s/p right ankle arthroscopy with debridement, microfracture and drilling of lateral talar osteochondral defect, lateral ankle reconstruction; low back pain secondary to antalgic gait; left SI joint dysfunction; left trochanteric bursitis; metatarsalgia of the right 2nd, 3rd and 4th metatarsal heads; and right plantar fasciitis. He opined these diagnoses were, within all reasonable medical probability, a direct result from the work-related injury on February 11, 2012, during claimant's employment with respondent.

Dr. Murati found claimant was temporarily and totally disabled from February 11, 2012 through March 7, 2013. He recommended yearly follow-up examinations for claimant's low back, left hip, and right lower extremity. Dr. Murati opined claimant will require a right ankle fusion as a result of this accident. The following permanent work restrictions were imposed, based on an eight hour day: no climbing ladders, no squatting, no manual driving, no repetitive foot controls with the right or the left; no lifting, carrying, pushing or pulling greater than 35 pounds occasionally, 20 pounds frequently and 10 pounds constantly; rarely bend, crouch, stoop or climb stairs; occasionally stand or walk; no lifting below knuckle height. He recommended claimant have a sit down job.

Using the *AMA Guides*, Dr. Murati assigned claimant a 5 percent whole person impairment for the low back, secondary to antalgic gait; 7 percent left lower extremity impairment (3 percent whole person) for left trochanteric bursitis; 5 percent right lower extremity impairment for loss of range of motion of the left ankle; 5 percent right lower extremity impairment for right plantar fasciitis; 2 percent right lower extremity impairment for metatarsalgia of the right 2nd metatarsal head; 2 percent right lower extremity impairment for metatarsalgia of the right 3rd metatarsal head; 2 percent right lower extremity impairment for metatarsalgia of the right 4th metatarsal; and 2 percent right lower extremity for loss of strength or the right great toe. The right lower extremity impairments combine for an 18 percent impairment, which converts to an 11 percent whole person impairment. The whole person impairments combine for an 18 percent whole person functional impairment.

Dr. Murati opined the prevailing factor in the development of claimant's conditions was the work accident.

Dr. Murati acknowledged no medical records supported claimant's allegations of low back pain and agreed pain is subjective and can be manipulated by a patient. However, he did find objective findings to support claimant's complaints of low back pain. He testified the back exam revealed the L5 spinous process to be most tender to palpation, with increased tone on the left, with guarding and withdrawal. Dr. Murati did not find that claimant was attempting to manipulate him. He opined the cause of claimant's back pain was the limp.

On September 24, 2013, Dr. Murati wrote that claimant's diagnosis did not change upon review of additional medical records. In an April 7, 2014, letter, he noted an MRI may be beneficial in determining whether claimant has low back and left hip pain. In a July 11, 2014, letter Dr. Murati agreed with the reading of the MRI.

Dr. Murati reviewed the task list of Karen Terrill and opined, out of 37 non-duplicated tasks, claimant could no longer perform 33, for an 89.2 percent task loss.

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., for an independent medical evaluation (IME), on January 7, 2014. Claimant presented with pain down through his foot and upward towards the calf. The symptoms are reduced in comparison to the original status with less than half of the original symptoms remaining. Claimant also complained of low back pain in the lumbosacral region, worse on the left. Claimant stated the back pain appeared to worsen, with sitting and standing for long periods. Lifting also worsened the pain. Claimant blamed the development of the back pain to the use of crutches and an altered gait.

During the physical examination, claimant displayed a notable limp. While claimant reported constant low back pain, there were no objective findings to support either the back pain or the hip pain. There was a complete lack of muscle spasm or specific point tenderness. Claimant was clear to Dr. Carabetta that the back pain developed later, after the accident.

Claimant was rated at 11 percent of the right lower extremity, pursuant to the AMA Guides, with no functional rating for either the hip or back.

Claimant met with Karen Terrill, by telephone, on October 3, 2014. Claimant held several other jobs after the accident. Claimant was working for Brickman Group as a foreman at the time of this visit, working 44 to 50 hours a week at \$13 an hour with time and a half for overtime. The number of hours varied according to the season. Ms. Terrill agreed the job claimant worked for the Brickman Group was outside the restrictions placed upon him by Dr. Murati.

Ms. Terrill acknowledged that claimant never held a post-injury job inside the limitations imposed by Dr. Murati, which would have required a sit down job. Ms. Terrill agreed if claimant were to obtain a job within Dr. Murati's limitations, he would be making significantly less than the work he is currently performing. Combined with his other limitations, if claimant were able to secure employment, it would primarily be at the sedentary, unskilled level, essentially sitting 6 out of 8 hours in a day. Ms. Terrill used Liberal, Kansas as claimant's labor market and determined the weekly wage range to be \$329.20 (\$8.23 an hour) to \$428.40 (\$10.71 an hour).

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...
(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Claimant contends he suffered a work-related accident on February 11, 2012, which resulted in permanent impairment to his right lower extremity at the ankle, bilateral hips and low back. Respondent does not dispute the injury to the right ankle. However, the injury claims to the hips and low back are contested.

Claimant came under the care of Dr. Shields beginning on July 25, 2012. The treatment was restricted to the right lower extremity. Even though claimant contends he told Dr. Shields of the low back and hip complaints, her medical records contain no such notations. Additionally, claimant failed to display a limp at any time while he was being treated by Dr. Shields.

Claimant's testimony regarding the hips and low back is inconsistent. He has testified at times to hip and low back pain since the accident, while using crutches and after the ankle surgery. While several doctors in this record do indicate claimant has low back pain and displayed a noticeable limp, those evaluations were after claimant left respondent and worked for several different employers performing heavy manual labor. The Board finds it significant that claimant never requested nor was provided medical treatment for the hips or back, and performed several heavy manual labor jobs after leaving respondent, with no restrictions. The mentions of those body parts occur as the result of physical exams only, not in relation to any treatment requests or recommendations.

The ALJ determined claimant failed to prove the prevailing factor for his back and hip conditions was the February 11, 2012 accident. The Board agrees and affirms the denial of benefits for both the hip and low back complaints.

K.S.A. 2012 Supp. 44-510d(b)(15)(23) states:

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...
(15) For the loss of a lower leg, 190 weeks.

...
(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The ALJ determined that Dr. Carabetta, the court ordered independent evaluating physician was the most credible in assessing claimant's functional impairment for the ankle injury. The Board agrees. Claimant suffered an 11 percent permanent partial impairment to his right lower leg as the result of the work injury on February 11, 2012. The Award of the ALJ is affirmed in all regards.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant failed to prove he suffered injury by accident to his hips and low back. Claimant proved he has an 11 percent permanent partial functional

impairment to the right lower extremity, at the level of the ankle, as the result of the accident on February 11, 2012.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 29, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge